

**No. 22-15286**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LT. COL. JONATHAN DUNN,  
*Plaintiff-Appellant,*

v.

LLOYD J. AUSTIN, III, in his official capacity as United States  
Secretary of Defense; FRANK KENDALL, in his official capacity  
as United States Secretary of the Air Force;  
COL. GREGORY HAYNES, in his official capacity;  
MAJ. GEN. JEFFREY PENNINGTON, in his official capacity;  
UNITED STATES DEPARTMENT OF DEFENSE,  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Eastern District of California  
No. 2:22-cv-00288-JAM-KJN (Hon. John A. Mendez)

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**APPELLANT'S SUPPLEMENTAL BRIEF  
OF FEBRUARY 21, 2023**

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Gene C. Schaerr  
Joshua J. Prince  
SCHAERR | JAFFE LLP  
1717 K Street NW, Suite 900  
Washington, DC 20006  
Telephone: (202) 787-1060  
*gschaerr@schaerr-jaffe.com*

Donald M. Falk  
SCHAERR | JAFFE LLP  
Four Embarcadero Center  
Suite 1400  
San Francisco, CA 94111  
Telephone: (415) 562-4942  
*dfalk@schaerr-jaffe.com*

*Attorneys for Plaintiff-Appellant Lt. Col. Jonathan Dunn*

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Lt. Col. Dunn submits this supplemental letter brief in response to the Court's order of January 19, 2023.

### **ARGUMENT**

In light of his current status and assignment, Section 525 of the National Defense Authorization Act for FY 2023, and the January 10, 2023 memorandum of Secretary Austin regarding the rescission of the coronavirus disease 2019 vaccination requirements for members of the armed services, Lt. Col. Dunn is unaware of any threatened and imminent harm to him that would come within the preliminary injunction requested in this appeal. This appeal from the denial of a preliminary injunction appears to be moot.

The case as a whole remains live, however. The district court's order denying a preliminary injunction should be vacated as moot, and the case should be remanded to the district court for further proceedings to determine whether Lt. Col. Dunn is entitled to permanent relief, including damages. *See, e.g., Arizona Alliance for Retired Americans v. Clean Elections USA*, 2023 WL 1097766 (9th Cir. Jan. 26, 2023); *Medicine v. McCulloch*, 544 Fed. Appx. 699, 700 (9th Cir. 2013); *Oster v. Wagner*, 504 Fed. Appx. 555, 555-56 (9th Cir. 2013); *Ethredge v. Hail*, 996 F.2d

1173, 1177 (11th Cir.1993); *Forbes v. Arkansas Educ. Television Communication Network Found.*, 982 F.2d 289, 289 (8th Cir.1992).

## CONCLUSION

The appeal should be dismissed as moot and the case remanded for further proceedings with instructions to vacate the order denying the preliminary injunction.

February 21, 2023

Gene C. Schaerr  
Joshua J. Prince  
SCHAERR | JAFFE LLP  
1717 K Street NW, Suite 900  
Washington, DC 20006  
Telephone: (202) 787-1060  
*gschaerr@schaerr-jaffe.com*

Respectfully submitted,

/s/ Donald M. Falk  
Donald M. Falk  
SCHAERR | JAFFE LLP  
Four Embarcadero Center  
Suite 1400  
San Francisco, CA 94111  
Telephone: (415) 562-4942  
*dfalk@schaerr-jaffe.com*

*Attorneys for Plaintiff-Appellant*

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of this Court's January 19, 2023, briefing order because it contains less than 20 pages, excluding the parts exempted by Fed. R. App. P. 32(f). It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word in 14-point Century Schoolbook, a proportionally spaced font.

/s/ Donald M. Falk

Donald M. Falk

*Attorney for Plaintiff-Appellant*

## **CERTIFICATE OF SERVICE**

I certify that I electronically filed this brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit today by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

February 21, 2023

SCHAERR JAFFE LLP

/s/ Donald M. Falk

Donald M. Falk

*Attorney for Plaintiff-Appellant*